Ernest Lee MILLER, Appellant,

v.

STATE of Florida, Appellee.

No. 58795.

Supreme Court of Florida.

March 25, 1982.

Rehearing Denied July 22, 1982.

Defendant was convicted before the Circuit Court, Pasco County, Wayne L. Cobb, J., of first-degree murder and was sentenced to death notwithstanding jury recommendation of life imprisonment, and defendant appealed. The Supreme Court held that: (1) although cellmate of defendant had acted as informant and had spoken with lead investigator of instant homicide before defendant made incriminating statement to codefendant, there was no error in admitting the statement, and (2) there was no error in imposing death penalty as disparity in recommended sentences, with jury which convicted codefendant of similar offense recommending death, was not warranted.

Affirmed.

McDonald, J., concurred with conviction and dissented with sentence with an opinion in which Overton, J., concurred.

1. Criminal Law ⇐412.1(2)

As overheard by cellmate, defendant's inculpatory statement to codefendant while awaiting trial was not required to be suppressed where although cellmate acted as informant in several drug cases and had spoken with lead investigator of instant homicide before defendant made the statement the cellmate and the detective testified that he was not to draw defendant or codefendant into talking about the homicide charges and there was no showing that he occupied a position of trust regarding defendant or that he deliberately used his position to secure incriminating information.

2. Criminal Law ⇐1170(5)

There was no reversible error in failing to allow defendant's psychologist to testify to his rehabilitative capacity as effectiveness of psychologist's testimony, even without the complained-of omission, was evidenced by jury's recommendation of life imprisonment.

3. Criminal Law ⇐983

Although jury, which found defendant guilty of first-degree murder recommended life imprisonment while another jury which found codefendant guilty of the same offense recommended death sentence, it was not error to impose death penalty on both defendants as on totality of circumstances virtually no reasonable person could differ on the appropriateness of the death penalty and disparity in recommended sentences was not warranted.

Larry S. Hersch of Waller & Hersch, Dade City, for appellant.

Jim Smith, Atty. Gen., and Michael J. Kotler, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Ernest Miller appeals his conviction of first-degree murder and sentence of death. We have jurisdiction[1] and affirm both the conviction and sentence.

A grand jury indicted Miller and his stepbrother William Jent for the death of a young woman known only as "Tammy." The trial court severed their cases for trial, but all their pre- and post-trial proceedings were combined. Their respective juries convicted each defendant of first-degree murder as charged, but Miller's jury recommended life imprisonment while Jent's recommended a sentence of death. In a combined sentencing order the trial court im-

1. Art. V, § 3(b)(1), Fla.Const.

posed the death penalty on both Miller and Jent.[2]

Miller urges nine points on appeal; six of these points[3] are identical to points raised in *Jent v. State*, 408 So.2d 1024 (Fla.1981), and have been decided adversely to Miller's contentions in *Jent*. Even though Miller and Jent had separate trials, *Jent* disposes of Miller's arguments regarding the evidence presented at his trial. With the exception of two witnesses who testified at only one trial each, the same persons testified substantially the same at both trials. On reviewing the instant record, we find Miller's conviction supported by competent substantial evidence.

Miller urges that the trial court erred in failing to suppress a statement which Miller made to Jent while in jail awaiting trial. While listening to a radio newscast about a man who had confessed to several murders, Miller asked Jent if he thought that person had "confessed to the one we did." A cellmate, lying on his bunk reading a book, overheard Miller's question and, after a suppression hearing, testified to this episode at trial.

[1] The cellmate had acted as an informant for the sheriff's department in several drug cases and had spoken with the lead investigator of the instant homicide sometime before Miller made his incriminating statement. This, claims Miller, made the cellmate an agent of the state, requiring reversal of his conviction under *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), and *Malone v. State*, 390 So.2d 328 (Fla.1980). We disagree.

Both the cellmate and the detectives who interviewed him testified that he was instructed not to draw Miller or Jent into talking about the charges against them. There is no evidence in the record to show that the cellmate occupied a position of trust regarding Miller. Likewise, there is no evidence that the cellmate "deliberately used his position to secure" incriminating information." 447 U.S. at 270, 100 S.Ct. at 2186. Unlike in *Malone*, Miller's comment was not "directly elicited by the State's stratagem deliberately designed to elicit an incriminating statement." 390 So.2d at 329. We find that the trial court did not err in denying the motion to suppress and properly allowed the cellmate's testimony into evidence.

[2] Miller's final arguments are that the trial court improperly limited the consideration of mitigating evidence and that the court erred in overriding the jury's recommendation of life imprisonment. The trial court gave the standard instruction on aggravating and mitigating circumstances, which this Court recently upheld against the same claim of unconstitutionality as made in this appeal. *Peek v. State*, 395 So.2d 492 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). We therefore find no merit to Miller's claim of impropriety regarding the sentencing instructions. Additionally, we do not find reversible error in the trial court's failing to allow Miller's psychologist to testify as to Miller's rehabilitative capacity. The effectiveness of the psychologist's testimony, even without the complained-of omission, is evidenced by the jury's recommendation of life imprisonment.

[3] In his sentencing order the trial court found no substantive difference between Miller and Jent in their participation in the crime. Notwithstanding the jury's recommendation, he found that Miller clearly deserved the death penalty. Mindful of the constitutional demand that the death penalty must be imposed in a regular, rational, consistent manner, the court also found that following the recommendation of Miller's jury would result in an unwarranted disparity in sentences. He therefore sentenced both defendants to death, finding

2. The facts are set out more fully in *Jent v. State*, 408 So.2d 1024 (Fla.1981).

3. (1) Denial of access to grand jury testimony; (2) sufficiency of the evidence; (3) failure to grant new trial; (4) "weakness" of the evidence in mitigation; (5) constitutionality of § 921.141(5)(i); (6) victim's identity.

that the mitigating evidence did not outweigh the evidence proved in aggravation.

The standard set out in *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975), has been met in this case. On the totality of the circumstances virtually no reasonable person could differ on the appropriateness of the death penalty. *See Johnson v. State*, 393 So.2d 1069 (Fla.1980). We agree that the disparity in the recommended sentences is not warranted. *See Barclay v. State*, 343 So.2d 1266 (Fla.1977), *cert. denied*, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d 237 (1978).

Finding no error, we affirm both the conviction and sentence.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD and ALDERMAN, JJ., concur.

McDONALD, J., concurs with conviction and dissents with sentence with an opinion, in which OVERTON, J., concurs.

McDONALD, Justice, dissenting.

I concur in affirming Miller's conviction but dissent as to his sentence.

The horrible death imposed upon the decedent was the culmination of a drug and alcohol infested party in which the defendants Miller and Jent participated with other young men and women. This group had left a bar and arrived at a swimming hole near a railroad trestle where the victim, not with or a part of the party, was encountered. A fight ensued between her and one of the girl friends, whereupon Miller and Jent interceded on behalf of the girl friend. These two thereafter beat the victim into helpless submission (Miller used a stick handed to him by one of the girls) following which they threw her into the trunk of Miller's car. Later she was raped by Miller, Jent and two more men while the girls looked on. They doused her with gasoline and set her afire. One can hardly imagine a more brutal, senseless, gruesome or deplorable crime. It cannot be condoned in the slightest. But it does not necessarily follow that the penalty should be death, particularly when the jury has recommended life.

In *Tedder v. State*, 322 So.2d 908 (Fla. 1975), this Court set out the standard which must be met in order to affirm a trial court's sentence of death over a jury's recommendation of life imprisonment.

When all the circumstances surrounding this homicide, in conjunction with the character and nature of the defendant are considered, it cannot be said that the facts are so clear and convincing that virtually no reasonable person could differ that death is appropriate. Therefore I feel the jury's recommendation should be followed.

A psychologist testified that Miller has a weak ego, that he is a "follower," that he is whatever his environment may be around him. He indicated that the violence that comes from Miller is what Miller believes others may want of him and that Miller would be quite willing to go along with them. The psychologist indicated that if the group were different so would be Miller's conduct. By its recommendation, the jury obviously considered this testimony and found Miller deserving of some mitigation of sentence. The defense presented no such evidence at Jent's sentencing proceeding, and I find that the evidence presented in the two sentencing proceedings justified the respective jury recommendations.

It appears to me that the trial judge felt that the circumstances of this homicide were so egregious that they overwhelmed any other consideration. Still, there was but one real aggravating circumstance (cruel, atrocious and heinous) and one admitted mitigating factor (no prior criminal record). The evidence is also susceptible of a finding that this defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

I would vacate Miller's sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole for twenty-five years.

OVERTON, J., concurs.

IN THE SUPREME COURT OF FLORIDA

THURSDAY, JULY 22, 1982

ERNEST LEE MILLER,	**	
Appellant,	**	CASE NO. 58,795
vs.	**	Circuit Court Case No. 79-8 (Pasco)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Deputy Clerk

cc: Hon. Joseph E. Pittman, Clerk
Hon. Wayne L. Cobb, Judge

Lester Bales, Jr., Esquire
Michael J. Kotler, Esquire

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PASCO COUNTY FLORIDA

CASE NUMBER CF79-847

STATE OF FLORIDA

VS.

ERNEST L. MILLER

JUDGMENT AND SENTENCE

You, ERNEST L. MILLER, being now before the Court, attended by your attorney, LARRY HERSCH, and you having (1) been tried and found guilty of [redacted] to MURDER IN THE FIRST DEGREE

the Court Adjudges that you are guilty of said offense, and it is the Sentence of the Law and the judgment of the Court that you, ERNEST L. MILLER, be committed to the custody of the (1) [redacted] CORRECTIONS to be imprisoned for the term of sentenced to Death. To be securely confined until such time as sentence is executed

and you are further Ordered to pay a fine and cost in the amount of $

DONE and ADJUDGED in open Court at DADE CITY Pasco County, Florida, this the 30th day of JANUARY, 19 80, pursuant to Rules 3.670 and 3.700 FCRP.

JUDGE

(Fingerprints, if required by Section 30.31 Florida Statutes)

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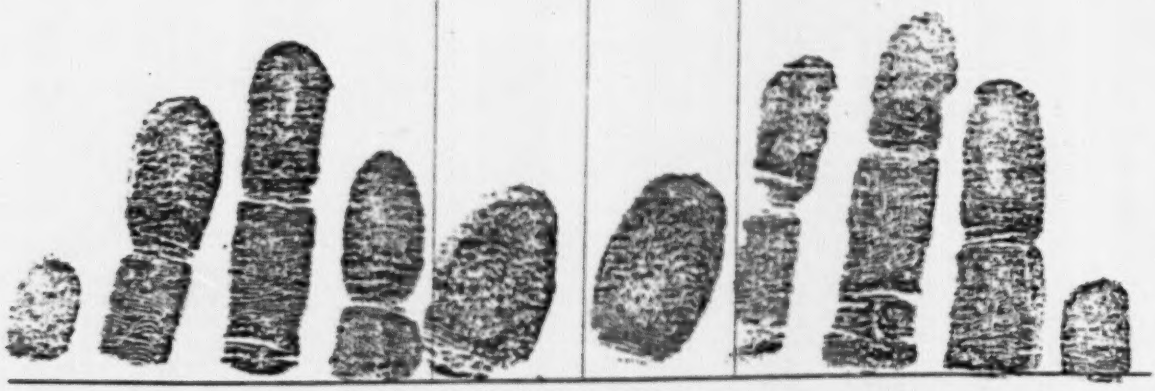

I hereby certify that the above and foregoing fingerprints on this judgment are the Fingerprints of the defendant, ERNEST L. MILLER, and that they were placed thereon by said defendant in my presence in open Court, this the 30th day of JANUARY, 19 80, pursuant to Section 30.31.

JUDGE

BOOK LL PAGE 0663

CLERK

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

STATE OF FLORIDA *
*
vs. * Case No. 7900848CFAES
*
ERNEST MILLER *
*

ORDER

THIS CAUSE having come on to be heard upon the Defendant's Motion for Grand Jury Testimony and the Court being fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that said Motion is hereby denied in that the Court felt there was no proper predicate laid to have it either transcribed or reviewed by counsel.

DONE AND ORDERED in Chambers, Dade City, Pasco County, Florida, on this 1 day of Nov., 1979.

WAYNE L. COBB, Circuit Judge

Copies to:
Larry S. Hersch, Esquire
State Attorney's Office
Public Defender's Office

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

STATE OF FLORIDA,	
Plaintiff,	
-vs-	CASE NUMBER 7900848CFAES
ERNEST LEE MILLER,	
Defendant.	

FILED
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PROCEEDINGS:	SENTENCING
BEFORE:	Honorable Wayne L. Cobb Circuit Judge Sixth Judicial Circuit
DATE:	January 30, 1980
PLACE:	Pasco County Courthouse Dade City, Florida
APPEARANCES:	Charles Cope, Esquire and Robert P. Cole, Esquire Assistant State Attorneys Attorneys for Plaintiff
	Larry S. Hersch, Esquire Attorney for Defendant

OFFICIAL COURT REPORTERS
303 PASCO COUNTY COURTHOUSE
DADE CITY, FL 33525
PH. (904) 567-3271

FRANK NEWMAN, OFFICIAL
LINDA J. GLIDEWELL, DEPUTY
PEGGY ANN CROFT, DEPUTY
JOHN P. DILLON, DEPUTY

particular case, you have seen the case, you have sat here. The case is one where a heinous and cruel murder was committed upon this girl, even evidence to indicate that she was still alive when she was burned.

Judge, the State's position is that the aggravating circumstances far outweigh the mitigating circumstances. If any case ever cried out for the death penalty, this one does.

The State would request that this Court impose the ultimate penalty in this case.

Thank you, Judge.

THE COURT: Thank you, Mr. Cole.

Mr. Jent and Mr. Miller, we need to fingerprint you, and Mr. Jackson would you fingerprint Mr. Miller and Mr. Jent, please?

THE BAILIFF: Yes, sir, Your Honor.

THE COURT: Mr. Miller and Mr. Jent, will you approach the bench, please, with your counsel.

Ernest Lee Miller and William Riley Jent, pursuant to the jury verdicts returned in your respective trials, this Court now adjudicates you each guilty of murder in the first degree of the girl known only to this Court as Tammy. It is now the duty of this Court to sentence each of you for that crime.

Under Florida law, only two sentences are available

to this Court; life imprisonment with a mandatory minimum of 25 years, or death, but this Court may not impose upon either of you any sentence other than those two, one of those two.

A few years ago, the U.S. Supreme Court determined that if the death penalty were to be imposed by the states that the U.S. Constitution demanded that it be imposed only with regularity and only under predetermined and objective standards and circumstances. The decision of whether or not to impose a sentence of death must not be left to the discretion of either juries or judges. The people of the State of Florida through their Legislatures have determined that the social value of individual human life demands the imposition of death penalty in certain cases. Those cases are first degree murder and sexual battery of children when certain established aggravating circumstances were found to outweigh certain established mitigating circumstances.

A jury in both of your cases have already weighed the circumstances. A jury for Mr. Miller recommended life imprisonment. A jury for Mr. Jent recommended death. This Court has carefully weighed those circumstances also, and I think it is incumbent upon this Court to tell you which circumstances it finds to be aggravating and which circumstances it finds to be

mitigating.

The first circumstance that the Court must consider is that the crime, aggravating circumstances, is that the crime for which the defendant is to be sentenced was committed while the defendant was under a sentence of imprisonment, that is not applicable in either of your cases.

Second is that at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital felony or of a felony involving the use or threat of violence to some person. That also was not applicable in either of your cases.

Third is that the defendant in committing the crime for which he is to be sentenced knowingly created great risk of death of many persons. Again, that is not applicable in either of your cases, in the Court's opinion.

Fourth is that the crime for which the defendant is to be sentenced was committed while the defendant was engaged or was an accomplice or commission of or attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping or aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb. I realize that there was some argument about that, but this Court

does not consider that to be applicable either.

The fifth is that the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or affect an escape from custody. I suppose that it could be argued that it was that, the last part of the murder was to prevent some detection, but this Court does not consider that fifth aggravating circumstance to be applicable after careful consideration.

Six is that the crime for which the defendant is to be sentenced was committed for pecuniary gain and there is no indication of that. That is not applicable.

Seventh is that the crime for which the defendant is to be sentenced was committed to disrupt or to hinder lawful exercise of a governmental function or enforcement of law. That is not applicable, no evidence of that.

Next is that the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with other indifference or for the enjoyment of suffering of others or pitiless. This Court certainly considers that aggravating circumstance to be applicable to this case.

Next is that the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. This Court also considers that aggravating circumstance to be applicable. However, there seems to be some overlapping -- some overlap in this Court's mind even though in those last two, so this Court is only going to consider those last two as one aggravating circumstance.

Mitigating circumstances must also be considered by the Court and they are first, that the defendant has no significant history of prior criminal activity. That mitigating circumstance appears to be applicable. There is no evidence that either of you have any significant history of prior activity.

Second is that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance. I don't know whether the jury considered that or not. Mr. Hersch has asked that that be considered applicable for Mr. Miller. This Court does not find any evidence in the trial or in any of the other proceedings that would indicate that Mr. Miller or Mr. Jent was under the influence of any extreme mental or emotional disturbance.

The next is that the victim was participant in the defendant's conduct or consented to the act. That certainly is not applicable.

Fourth is that the defendant was an accomplice in the offense for which he is to be sentenced that the offense was committed by another person and the defendant's participation was relatively minor. This Court can't honestly say that either of you were accomplices. The evidence is clear that both of you equally participated in this crime. The Court does not consider that to be applicable.

Fifth is that the defendant acted under extreme duress or under substantial domination of another person. There was some indication that the -- at the sentencing phase of Mr. Miller's trial by a psychologist that that might be applicable, that Mr. Miller was easily led and the inference at least is suggested that he was led by Mr. Jent. I don't know what weight the advisory jury gave to that in recommending a life sentence, but this Court does not consider that that is applicable in this case. There is no evidence that Mr. Miller had any diminished function at all. As a matter of fact, Dr. Merin testified that Mr. Miller's functional IQ was in the average range and theoretical IQ was above the average range.

The sixth is that the capacity of the defendant to appreciate the criminality of the conduct or to conform his conduct under requirement of the law was substantially impaired. There is no indication that either of you did not appreciate or were not able to appreciate the criminality of your conduct nor that you were not able to conform your conduct in this case to the requirements of the law. This Court does not consider that that is applicable for either of you.

The last mitigating circumstance that the Court must consider is the age of the defendant at the time of the crime. Mr. Miller is 23 years old and Mr. Jent is 28. You both are certainly of an age when that should not be considered as any mitigating circumstance. Our Supreme Court has said that it must be emphasized that the procedure to be followed by trial judges and juries in weighing these aggravating and mitigating circumstances is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but it is rather to be a reason judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

The goal in the law is regularity or uniformity in

the application of those available sentences. Now, the Court, our Supreme Court in Florida has also said that a jury recommendation under our trifurcated death penalty statute should be given great weight in order to sustain a sentence of death following a jury recommendation of life, the fact suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. That Court has also said that two coperpetrators who participated equally in the crime would have dispaired sentences if the jury recommendation were to be accepted has to be a strong consideration. The Court said it would have a hollow ring in the halls of justice if the sentences in those kind of cases were not equalized. This Court sat through the trials of both Mr. Miller and Mr. Jent. The evidence in both of those cases indicated that this was a particularly heinous and a particularly deliberate crime to this Court evidence is that this girl was beaten at one site on the Withlacoochee River then transported to Mr. Miller's home where the girl although unconscious and I don't know whether she was feeling pain or not or feeling embarrassment or what but then she was subjected to the indignity of having her clothes taken off and being raped by four people while other people

were forced to watch while laying on the hood of a car or the trunk of a car. She was then carried some several miles into the Richloam Game Reserve where she was then thrown on the ground and gasoline was poured over her and there was an indication that Mr. Jent at Mr. Jent's trial that she then raised her arm in an attempt to get up and that it was, that gasoline was -- she was knocked back down and then the gasoline was ignited. This Court has examined most if not all of the death penalty cases reviewed by the Florida Supreme Court since 1972. It would be hard to imagine this Court finding perhaps only one in which the murder was any more heinous, any more deliberate than it was in this case. The Court therefore must find that the aggravating circumstances or circumstances in both of these cases outweigh the mitigating circumstances and it is therefore the sentence of this Court that both Mr. Miller and Mr. Jent be put to death according to the law of Florida.

Gentlemen, you have the right to an automatic appeal to the Supreme Court of the State of Florida as a result of this sentence and adjudication. I am hereby directing the respective attorneys to pursue that appeal or to prosecute that appeal with dispatch and vigor directing the Clerk to prepare the certify -- and certify

the record of this trial to the Supreme Court with 60 days and directing the Court Reporter to prepare the record of these proceedings including the proceedings last night on motions for a new trial. Mr. Holton, do you have any questions?

MR. HOLTON: I have no questions about the sentence, Your Honor, I would request that Mr. Jent be allowed some visitation with his family prior to his being transported to the system. Visitation this date has been essentially through a six by six inch glass window at the jail. Since I think it's a fairly safe bet that Mr. Jent will be a little hard to reach in the near future, it would I think be a courtesy that would be appreciated by myself and by Mr. Jent if the Court would direct the sheriff to make arrangements for such visitation under whatever security precautions the sheriff feels necessary.

THE COURT: Mr. Holton, I would advise that I wi-l investigate that and what I would like to do and I would like to do that if it's reasonably possible. If it is; if it is, I will direct the sheriff to do that. I am not doing it without some investigation as to serious problems and I'm not aware of those at this time.

MR. HOLTON: Yes, sir.

THE COURT: I'll do that right away.

MR. HOLTON: Thank you.

THE COURT: Mr. Hersch?

MR. HERSCH: I would also make the same request. Mr. Miller hasn't had close contact with his family except during the trial proceedings when they saw him passing back and forth. I would.

THE COURT: I will investigate that for both of you and try to get some decision on that in the next few minutes. Anything else?

MR. COLE: No, sir.

THE COURT: Madam Clerk?

THE CLERK: No, sir.

THE COURT: This Court will stand adjourned.

(Proceedings concluded.)

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

CF79-847

Opn 3127

STATE OF FLORIDA :
:
vs :
:
WILLIAM RILEY JENT; :
EARNEST LEE MILLER :

FINDINGS IN SUPPORT OF SENTENCES

On November 15, 1979, Earnest Lee Miller was convicted by a jury of the first degree murder of a girl known only as Tammy. That same jury recommended a life imprisonment sentence for Mr. Miller. On December 20, 1979, a different jury also convicted William Riley Jent of first degree murder in the same incident. That same jury recommended a death sentence for Mr. Jent.

It is now this Court's duty to sentence both Earnest Lee Miller and William Riley Jent for the first degree murder of a girl known only as Tammy.

In preparing to exercise that duty, this court carefully reviewed the Florida law relating to sentencing in capital cases (§921.141, Florida Statutes, and cases listed in appendix) and also carefully reviewed the application of the principles of the United States Constitution to sentencing in capital cases. Furman v. Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972); Proffitt v. Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976); Dixon v. State, 283 So.2d 1 (Fla. 1973).

This court presided over the trials of both defendants. A pre-sentence investigation was not considered by this Court to offer any assistance in this case and was not requested. It is not required. Thompson v. State, 328 So.2d 1, 4 (Fla. 1976).

Florida law only allows two choices in imposing sentences for capital felonies: life imprisonment with a mandatory minimum service of 25 years before being eligible for parole, or death. §775.082, Florida Statutes.

The Florida Legislature has also established guidelines to control and direct the exercise of the sentencing court's discretion

in selecting and imposing the proper sentence in capital cases. §921.141, Florida Statutes. Under these guidelines, the Court must consider and weigh certain specified aggravating and mitigating circumstances.

From all of the evidence available, this Court finds the following aggravating circumstances to exist in this case:

1. §921.141(5)(h), Florida Statutes. This murder was especially heinous, atrocious and cruel. These two defendants, in concert, beat this girl to unconsciousness, loaded her into an automobile, drove her to an isolated home of the defendant Miller, took her out of the automobile still unconscious, stripped her of her clothing, threw her onto the trunk (or hood) of an auto, subjected her to rape by four men while requiring several other girls to watch, dumped her unceremoniously back into the trunk of an auto, drove her to a secluded spot in the Withlacoochee State Forest, drug her out of the auto trunk, carried her into the bushes, poured gasoline on her, beat her back down when she tried to get up, then immolated her and left her to the processes of final degradation--acts epitomical of "wicked," "shockingly evil," and "vile." Furthermore, these acts demonstrated the defendants to not only be pitiless, but the public, gang rape of this victim during the perpetration of this murder demonstrated these defendants' enjoyment of the suffering of the nameless victim. Even the imagination of Hollywood at its most macabre is paled by the cruelty, the heinousness and the atrocity of this murder.

2. §921.141(5)(i), Florida Statutes. This crime was certainly committed by these two defendants in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Counsel for the defendants argued that the defendants must have thought the girl was dead following the first beating on the bank of the Withlacoochee River and that the remainder of their atrocities were seemingly committed on a lifeless corpse. However, even ignoring the testimony during the trial of the defendant Jent that the girl tried

to sit up after the gasoline was poured on her, but before she was ignited. This Court cannot believe these defendants could for over an hour drag this girl in and out of automobiles, strip her clothes from her body and each rape her while she was lying on the trunk of an auto without realizing that she was warm, flexible and alive.

The conduct of the defendants was so callous in this case, however, that these two aggravating circumstances seem to blend into one.

None of the other aggravating circumstances are found to apply.

Having found aggravating circumstances to apply, the Court must consider any mitigating circumstances. Upon application of the available evidence in this case to the statutory mitigating circumstances, the Court finds as follows:

1. §921.141(6)(a), Florida Statutes. The defendants have no significant history of prior criminal activity. This mitigating circumstance applies to both defendants.

2. §921.141(6)(b), Florida Statutes. There was no evidence that this crime was committed while either defendant was under the influence of any mental or emotional disturbance. This mitigating circumstance does not apply to either defendant.

3. §921.141(6)(c), Florida Statutes. There was no evidence that the victim in this case was a willing participant in the defendants' conduct or consented to the acts culminating in her death. This mitigating circumstance does not apply to either defendant.

4. §921.141(6)(d), Florida Statutes. The defendants were accomplices in this crime but the participation of each defendant was equally aggressive and malevolant. Furthermore, no evidence indicated that either defendant acted under any duress or any domination of another person. At the sentencing phase of the trial of defendant Miller, Dr. Sidney Merin, a psychologist, did testify that Miller was a social follower. The jury may have been emotionally impressed with this personality appraisal. The jury recommended life imprisonment for Miller. But that appraisal does not square with he facts in

this case. The eyewitness' testimony indicated that each of these defendants tried to out-atrocity the other in killing this girl. This Court finds that neither of these mitigating circumstances applies to either of these defendants.

5. §921.141(6)(f), Florida Statutes. Dr. Merin testified that the defendant Miller had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. The evidence supports this appraisal for both Miller and Jent. They both knew the criminality of their conduct and were able to conform their conduct to the requirements of the law. The evidence indicates they enjoyed their heinous abandon. This mitigating circumstance does not apply to either defendant.

6. §921.141(6)(g), Florida Statutes. Jent was 28 years old and Miller 23 years old at the time of this crime. Both were of sufficient age that this mitigating circumstance does not apply to either.

After weighing the aggravating and mitigating circumstances existing in this case and comparing them to the circumstances found to be existing in most (if not all) of the death sentences reviewed by the Florida Supreme Court since 1972 (see appendix), this Court believes the aggravating circumstances of this case do outweigh the mitigating circumstances and a death sentence to be demanded for both defendants.

The jury that tried defendant Miller recommended life imprisonment for him. The Jent jury recommended death. In view of the Miller recommendation, this Court is required to give "greater weight" to the mitigating circumstances for him. Beckren v. State, 355 So.2d 111 (Fla. 1978). That jury weighed and considered the same aggravating and mitigating circumstances that have been weighed by this Court. Although this Court is not bound by the advisory sentencing verdicts, they do represent a direct expression of the social conscience of an informed

and responsible microcosm of our society. "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908 (Fla. 1975). See also Lamadlin v. State, 305 So.2d 17 (Fla. 1974); McCaskill v. State, 344 So.2d 1726 (Fla. 1977). "It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment." Thompson v. State, 328 So.2d 1, 5 (Fla. 1976).

The evidence indicated no substantive difference whatsoever in the participation of these two defendants in this crime. The only evidence available to either the court or these two juries that might be considered to distinguish these two defendants is: (1) Jent was 28 years old while Miller was 23 years old, and (2) Dr. Merin testified that Miller was a social follower, while no psychologist testified for Jent.

This Court has carefully considered these two possible distinctions but does not see any rational basis supported by even a shred of evidence to consider either of these factors as a mitigating circumstance. These defendants participated equally in this crime.

Furthermore, of all the factual situations reviewed by the Florida Supreme Court since 1972, in death cases, this Court found only one approaching the cruelty, atrocity, or heinousness demonstrated in the case sub judice. (See Gardner v. State, 313 So.2d 675 (Fla. 1975))

> "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting

> process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

The United States Supreme Court has determined that if the death penalty is to be imposed by the states, the United States Constitution demands that it be imposed with regularity, rationality and consistency. Proffit v. Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960, reh. den. 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198 (1976); Furman v. Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972).

The jury for the defendant Jent has recommended death and this court finds that the weight of the aggravating and mitigating circumstances demand death sentences for both defendants. Therefore, if the recommendation of the jury for the defendant Miller were followed, that would result in two co-perpetrators who participated equally in a crime having disparate sentences. It would cause a hollow ring in the Florida halls of justice if the sentences in these cases were not to be equalized. (See Barclay v. State, 343 So.2d 1266 (Fla. 1977)).

It becomes obvious from even a cursory review of the facts supporting sentences of death reviewed by the Florida Supreme Court during the last eight years, that reasonable jurors have recommended death sentences be imposed in cases much less heinous, atrocious, cruel or deliberate than is found in this case.

Therefore after carefully weighing the aggravating and mitigating circumstances of this case, and considering the two disparate advisory sentencing verdicts, and after comparing the circumstances of this case with the circumstances existing in the death sentence cases reviewed by the Florida Supreme Court since 1972 which are listed in the appendix, and after carefully considering

the Constitutional standards espoused in Furman v. Georgia, supra, and Proffit v. Florida, supra, it is the judgment of this Court that both William Riley Jent and Earnest Lee Miller be put to death in the manner provided by Florida law for the first degree murder of a girl known only as Tammy.

DONE AND ORDERED in Chambers, Dade City, Pasco County, Florida, this 20 day of February, 1980.

WAYNE A. COBB, Circuit Judge

Copies furnished to:

Office of the State Attorney
Leonard J. Nolton, Esquire
Larry S. Hersch, Esquire

APPENDIX

Adams v. State, 341 So.2d 765 (Fla. 1976)

Aldridge v. State, 351 So.3d 942 (Fla. 1977)

Alford v. State, 307 So.2d 433 (Fla. 1975)

Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 96 S. Ct. 3234, 428 U.S. 923, 49 L. Ed. 2d 1226

Barclay v. State, 343 So.2d 1266 (Fla. 1977)

Barclay v. State, 362 So.2d 657 (Fla. 1978)

Brown v. State, 367 So.2d 616 (Fla. 1979)

Buckrem v. State, 355 So.2d 111 (Fla. 1978)

Burch v. State, 343 So.2d 831 (Fla. 1977)

Chambers v. State, 339 So.2d 204 (Fla. 1976)

Cooper v. State, 336 So.2d 1133 (Fla. 1976)

Darden v. State, 329 So.2d 287 (Fla. 1976), cert. den. 97 S. Ct. 1671, 430 U.S. 704, 51 L. Ed. 2d 751

Dobbert v. State, 328 So.2d 433 (Fla. 1976)

Dobbert v. State, 375 So.2d 833 (Fla. 1978)

Douglas v. State, 328 So.2d 18 (Fla. 1976)

Elledge v. State, 346 So.3d 998 (Fla. 1977)

Foster v. State, 369 So.2d 928 (Fla. 1979)

Funchess v. State, 341 So.2d 762 (Fla. 1976)

Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972)

Gardner v. State, 313 So.2d 675 (Fla. 1975)

Gibson v. State, 351 So.2d 948 (Fla. 1977)

Good v. State, 365 So.2d 381 (Fla. 1979)

Halliwell v. State, 323 So.2d 577 (Fla. 1975)

Harvard v. State, 375 So.2d 833 (Fla. 1978)

Henry v. State, 328 So.2d 430 (Fla. 1976), cert. den. 97 S. Ct. 370, 429 U.S. 951, 50 L. Ed. 2d 319

Hoy v. State, 353 So.2d 826 (Fla. 1977)

Huckaby v. State, 343 So.2d 29 (Fla. 1977), cert. den. 98 S. Ct. 393, 434 U.S. 920, 54 L. Ed. 2d 276

Jackson v. State, 359 So.2d 1190 (Fla. 1978)

Jackson v. State, 366 So.2d 752 (Fla. 1978)

Jones v. State, 332 So.2d 615 (Fla. 1976)

Kampff v. State, 371 So.2d 1007 (Fla. 1979)

Knight v. State, 338 So.2d 201 (Fla. 1976)

Lamadlin v. State, 303 So.2d 17 (Fla. 1974)

LeDuc v. State, 365 So.2d 149 (Fla. 1978)

Lee v. State, 294 So.2d 305 (Fla. 1974), app. after remand 340 So.2d 474

McCaskill v. State, 344 So.2d 1276 (Fla. 1977)

Meeks v. State, 336 So.2d 1142 (Fla. 1976)

Meeks v. State, 339 So. 2d 186 (Fla. 1976)

Menendez v. State, 368 So.2d 1278 (Fla. 1979)

Messer v. State, 330 So.2d 137 (Fla. 1976)

Miller v. State, 332 So.2d 65 (Fla. 1976)

Miller v. State, 373 So.2d 882 (Fla. 1979)

Proffit v. Florida, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976)

Province v. State, 337 So.2d 783 (Fla. 1976), cert. den. 97 S. Ct. 2929, 431 U.S. 969, 53 L. Ed. 2d 1065

Purdy v. State, 343 So.2d 4 (Fla. 1977), cert. den. 98 S. Ct. 153, 434 U.S. 847, 54 L. Ed. 2d 114

Raulerson v. State, 358 So.2d 826 (Fla. 1978)

Reino v. State, 352 So.3d 853 (Fla. 1977)

Riley v. State, 366 So.2d 19, (Fla. 1979)

Salvatore v. State, 366 So.2d 745 (Fla. 1979)

Slater v. State, 316 So.2d 539 (Fla. 1975)

Smith v. State, 365 So.2d 704 (Fla. 1978)

Songer v. State, 322 So.2d 481 (Fla. 1975), cert. granted 97 S. Ct. 1594,

Spinkellinch v. State, 313 So.2d 666 (Fla. 1975)

Spinkellinch v. Wainwright, C.A. 578 F.2d 582 (1978)

State v. Carroll, 287 So.2d 304 (Fla. 1973)

State v. Dixon, 283 So.2d 1 (Fla. 1973)

Swan v. State, 322 So.2d 485 (Fla. 1975)

Taylor v. State, 294 So.2d 648 (Fla. 1974)

Tedder v. State, 322 So.2d 908 (Fla. 1975)

Thomas v. State, 374 So.2d 508 (Fla. 1979)

Thompson v. State, 328 So.2d 1 (Fla. 1976)

Washington v. State, 362 So.2d 658 (Fla. 1978)

Witt v. State, 342 So.2d 497 (Fla. 1977)

FLORIDA STATUTES

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an

advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have

priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

§ 90.801 Hearsay; definitions; exceptions

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is: (a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition.

§ 905.27 Testimony not to be disclosed; exceptions

> (1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:
>
> (a) Ascertaining whether it is consistent with the testimony given by the witness before the court;
>
> (b) Determining whether the witness is guilty of perjury; or
>
> (c) Furthering justice.

SURVEY OF STATE RULES ON GRAND JURY TESTIMONY*/

I. STATES WHICH BROADLY ALLOW ACCESS, ONCE GRAND JURY WITNESS HAS TESTIFIED AT TRIAL

Pennsylvania: Commonwealth v. Brocco, 396 A.2d 1371 (Pa. Super. 1979)

Commonwealth v. Kelly, 369 A.2d 438 (Pa. Super. 1976), aff'd, 399 A.2d 1061 (Pa.), cert. denied and app. dismissed, 444 U.S. 947 (1979)

Massachusetts: Commonwealth v. Edgerly, 361 N.E.2d 1289 (Mass. 1977)

Commonwealth v. Liebman, 400 N.E.2d 842 (Mass. 1980)

Indiana: Gunn v. State, 365 N.E.2d 1234 (Ind. App. 1977)

Marlett v. State, 348 N.E.2d 86 (Ind. App. 1976) (when foundation laid and state gives "no valid reason for non-production," error to deny motion to produce)

Antrobus v. State, 254 N.E.2d 873 (Ind. 1970) (requires foundation that witness has testified on direct, that "substantially verbatim" transcript of grand jury statement "is shown to be probably within the control of the prosecution, and previous statements relate to witness's present testimony." 254 N.E.2d at 876-77)

Colorado: Parlapiano v. District Court In and For Tenth Jud. Dist., 491 P.2d 965 (Colo. 1971) (court should ordinarily grant motion to disclose grand jury testimony prior to trial, absent showing by

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*/ This Appendix reviews the apparent status of a defendant's access to grand jury testimony of witnesses in the 41 states in which controlling authorities were uncovered. It is not intended to be an exhaustive review of case law in each state but is intended as an aid to the Court.

district attorney that it should not be disclosed)

People Ex. Rel. Shinn v. District Court of and for the Fifteenth Jud. Dist., 469 P.2d 732 (Colo. 1970)

Norman v. People, 496 P.2d 1029 (Colo. 1972)

Michigan: People v. Duncan, 201 N.W.2d 629 (Mich. 1972)

People v. Wimberly, 179 N.W.2d 623 (Mich. 1970)

Iowa: State v. Gartin, 271 N.W.2d 902 (Iowa 1978)

State v. Cuevas, 282 N.W.2d 74 (Iowa 1979)

Oregon: State v. Hartfield, 624 P.2d 588 (Ore. 1981) (particularized need exists to test witness's credibility once a grant jury witness testifies at trial)

Arizona: State v. Casey, 460 P.2d 52 (Ariz. App. 1969) ("grand jury testimony must be made available to a defendant when a request therefor is made during the course of trial to cross examine a witness for purposes of impeachment, refreshing his recollection, or to test his credibility." 460 P.2d at 54.)

State Ex. Rel. Ronan v. Superior Court In and For County of Maricopa, 390 P.2d 109 (Ariz. 1964)

Illinois: People v. Lentz, 304 N.E.2d 278 (Ill. 1973)

People v. Johnson, 203 N.E.2d 399 (Ill. 1964)

Nevada: Shelby v. Sixth Judicial District Court, 414 P.2d 942 (Nev.), reh. denied, 418 P.2d 132 (1966)

California: People v. Sola, 200 Cal. App.2d 593, 19 Cal. Rptr. 327 (1962) (accused entitled by statute to copy of grand jury proceedings to prepare defense)

People v. Pipes, 179 Cal. App.2d 547, 3 Cal. Rptr. 814 (1960)

New Jersey: State v. Dimodica, 192 A.2d 825 (N.J. 1963)

State v. Cronin, 206 A.2d 914 (N.J. Super. 1965)

Kentucky: Faught v. Commonwealth, 467 S.W.2d 322 (Ky. 1970) (only when grand jury testimony is reported is defendant entitled to a copy of it on request)

Smith v. Commonwealth, 321 S.W.2d 786 (Ky. 1959)

New York: People v. Baker, 75 A.D.2d 966, 428 N.Y.S.2d 353 (1980)

People v. Renner, 80 A.D.2d 705, 437 N.Y.S.2d 749 (1981)

Gold v. Quinones, 37 A.D.2d 618, 325 N.Y.S.2d 294 (1971)

People v. Oldring, 42 A.D.2d 737, 346 N.Y.S.2d 14 (1973)

People v. Monahan, 21 A.D. 76, 249 N.Y.S.2d 562 (1964)

People v. Surita, 18 A.D. 1064, 239 N.Y.S.2d 405 (1963)

Connecticut: State v. Canady, 445 A.2d 895 (Conn. 1982) (statute enacted in 1981 on availability of transcript to accused to use for impeachment, attacking credibility or proving inconsistent statements; access only under general supervisory power of the court)

Oklahoma: English v. District Court of Adair County, 492 P.2d 1125 (Okla. Cr. 1972) (defendants had right under statute to grand jury testimony of witnesses who testified against them)

Cf: State Ex. Rel. Fallis v. Miracle, 494 P.2d 676 (Okla. Cr. 1972) (refusing to extend coverage of statute to defendants charged by information)

Minnesota: State v. Falcone, 195 N.W.2d 572, 576 n.8 (Minn. 1972) (defense attorney may discover grand jury minutes after presentment, citing Minn. St. § 628.04)

New Mexico: State v. Vigil, 516 P.2d 1118 (N.M. 1973) (no requirement of particularized need for defendant to obtain copy of grand jury testimony of witness who has "actually appeared and testified.")
State v. Felter, 515 P.2d 138 (N.M. 1973) (particularized need demonstrated by witness testifying at trial)

Vermont: Berard v. Moeykens, 326 A.2d 166 (Vt. 1974)
Vermont Rules of Criminal Procedure 16(a)(2)(B) (effective January 1, 1974 -- disclosure to defendant on request at appearance or later "the transcript of any grand jury proceedings pertaining to the indictment of the defendant or of any inquest proceedings pertaining to the investigation of the defendant.")

Kansas: Kansas Code of Criminal Procedure, K.S.A. 22-3212, 22-3213.
State v. Humphrey, 537 P.2d 155 (Kan. 1975) (discovery provisions of K.S.A. 22-3213 should be "liberally construed.")
State v. Campbell, 539 P.2d 329 (Kan.), cert. denied sub nom. Docking v. Kansas, 423 U.S. 1017 (1975) ("K.S.A. 22-3213 provides that no statement of a prospective state witness shall be subject to inspection until the witness

has testified at the preliminary hearing or on direct examination at trial." 539 P.2d at 351)

II. STATES WHICH ALLOW ACCESS ONLY ON SHOWING OF PARTICULARIZED NEED, DEMONSTRATED INCONSISTENCIES, OR JUDICIAL DISCRETION

Ohio: State v. Greer, 420 N.E.2d 982 (Ohio 1981)
State v. Morris, 329 N.E.2d 85 (Ohio 1975), cert. denied sub nom. McSpadden v. Ohio, 423 U.S. 1049 (1976)

Rhode Island: State v. Benoit, 363 A.2d 207 (R.I. 1976)
State v. Carillo, 307 A.2d 773 (R.I. 1973) (access not a matter of right but court should grant motion where defendant demonstrates particularized need)

South Dakota: State v. Kaseman, 273 N.W.2d 716 (S.D. 1978)

Florida: Nelson v. State, 362 So.2d 1017 (Fla. App. 1978)
Minton v. State, 113 So.2d 361 (Fla. 1959)

Maine: State v. Cugliata, 372 A.2d 1019 (Me.), cert. denied, 434 U.S. 856 (1977)
State v. Robbins, 318 A.2d 51 (Me. 1974)

Maryland: Silbert v. State, 280 A.2d 55 (Md. App. 1971)
Chester v. State, 363 A.2d 605 (Md. App. 1976)

Texas: Hoffpauir v. State, 596 S.W.2d 139 (Tex Cr. App. 1980)
McManus v. State, 591 S.W.2d 505 (Tex. Cr. App. 1980)
Martin v. State, 577 S.W.2d 490 (Tex. Cr. App. 1979)
Dyche v. State, 490 S.W.2d 568 (Tex. Cr. App. 1973)

Alaska: Merrill v. State, 423 P.2d 686, (Alaska), cert. denied, 386 U.S. 1040 (1967) (particularized need must be shown for defendant to inspect grand jury minutes -- absent here)

Missouri: State v. Guelker, 548 S.W.2d 521 (Mo. 1976), cert. denied, 431 U.S. 941, reh. denied, 434 U.S. 882 (1977) (review of grand jury testimony only in discretion of trial judge; in camera review showed inconsistencies on minor details between trial testimony and police report insufficient to permit inspection)

State v. Cusumano, 372 S.W.2d 860 (Mo. 1963) (wide discretion of trial court to permit inspection of grand jury testimony)

Tennessee: West v. State, 466 S.W.2d 524 (Tenn. Cr. App.), cert. denied, (Tenn. 1971) (no blanket discovery -- statute allows secrecy of grand jury proceeding to be invaded to "check upon the accuracy of a witness' subsequent testimony" or "whenever necessary to the attainment of truth and justice.")

Washington: State v. Beck, 349 P.2d 387 (Wash. 1960) (affirmed trial court decision by equally divided court), aff'd, Beck v. Washington, 369 U.S. 541 (1961), reh. denied, 370 U.S. 965 (1962) (defendant not entitled to copy of his testimony before grand jury as a matter of right -- "the extent to which such a transcript will be made available to him is within the sound discretion of the trial court." 349 P.2d at 396)

Utah: State v. Faux, 345 P.2d 186 (Utah 1959) (judicial discretion not abused in releasing copy of grand jury transcript to defendant prior to trial to prepare for impeachment of prospective witnesses)

Delaware: In Re Steigler, 250 A.2d 379 (Del. Sup. 1969) (disclosure of grand jury proceeding may be ordered by court "in circumstances where the interests of justice require it" -- bail case. 250 A.2d at 382)

Hawaii: McMahon v. Office of the City and County of Honolulu, 465 P.2d 549 (Hawaii 1970)("Even under a most restrictive view, it is clear that a defendant is under some circumstances entitled to some part of the grand jury transcript." 465 P.2d at 550)

III. STATES DENYING ACCESS, EXCEPT UNDER VERY LIMITED CIRCUMSTANCES

Arkansas: Arnold v. State, 20 S.W.2d 189 (Ark. 1929) (defendant in murder prosecution had no access to grand jury witness statements)

Alabama: Redus v. State, 398 So.2d 757 (Ala. App.), cert. denied, 398 So.2d 762 (Ala. 1981)
Brager v. State, 380 So.2d 401 (Ala. App. 1980)
Stroud v. State, 325 So.2d 200 (Ala. App. 1975), cert. quashed, 325 So.2d 204 (1976) (no error in refusing access unless State uses "to test recollection, to impeach, or unless contradiction is shown"; Alabama rejects Jencks)
Thigpen v. State, 270 So.2d 666 (Ala. App. 1972)
Sanders v. State, 179 So.2d 35 (Ala. 1965)

Louisiana:	State v. Sheppard, 350 So.2d 615 (La. 1977) State v. Martin, 376 So.2d 300 (La. 1979), cert. denied, 449 U.S. 998 (1980), reh. denied, 449 U.S. 1119 (1981)
New Hampshire:	State v. Purrington, 446 A.2d 451 (N.H. 1982) (improper for trial court to order transcription of grand jury proceedings, thus defendant not entitled to discovery of grand jury testimony) State v. Booton, 329 A.2d 376 (N.H. 1974), cert. denied, 421 U.S. 919 (1975) (grand jury minutes not transcribed, thus impossible to grant defendant's request for minutes)
North Carolina:	State v. Jones, 210 S.E.2d 454 (N.C. App. 1974), cert. denied, 214 S.E.2d 435 (N.C. 1975) (no error in denial of motion for transcript of grand jury testimony because such testimony not recorded in the state)
Idaho:	State v. Bullis, 472 P.2d 315 (Idaho 1970) (no error in trial court denying request to make transcript of grand jury testimony; secrecy of grand jury proceedings must be maintained)
Wisconsin:	State v. Krause, 50 N.W.2d 439 (Wis. 1951) Steensland v. Hoppmann, 252 N.W. 146 (Wis. 1933) (inspection of grand jury minutes only allowed "in the instances provided for by legislation and permitted by the courts when necessary to protect the rights of citizens in the administration of justice." 252 N.W. at 148)

SURVEY OF STATE LAWS ON JUDGE/JURY ROLES IN DEATH SENTENCE DETERMINATIONS

1. Jury Life Determination Binding

ARKANSAS	Crim. Code §§ 41-1301.-1302 (1977)	U
CALIFORNIA	Penal Code §§ 190.3-.4 (Supp. 1982)	U
COLORADO	Rev. Stats. § 16-11-103 (Cum. Supp. 1981)	U
CONNECTICUT	Gen. Stats. Ann. § 53a-46a (Supp. 1982)	C
DELAWARE	Code Ann. § 11-4209 (1979)	U
GEORGIA	Code Ann. § 17-10-31 (1982)	U
ILLINOIS	Ann. Stats. § 38-9-1 (Supp. 1982)	U
KENTUCKY	Rev. Stats. § 532.025 (1982)	U
LOUISIANA	Code of Crim. Proc. art. 905.8 (Supp. 1982)	U
MARYLAND	Ann. Code art. 27, § 413 (Cum. Supp. 1982)	U
MASSACHUSETTS	Ann. Code ch. 279, § 53 (1980)	U
MISSISSIPPI	Code § 99-19-101 (Cum. Supp. 1978)	U
MISSOURI	Crim. Code § 565.006 (Supp. 1982)	U
NEVADA	Rev. Stats. § 175.554 (1977)	N
NEW HAMPSHIRE	Rev. Stats. Ann. § 630.5 (Supp. 1981)	U
NEW JERSEY	Senate Bill No. 112 (1982)	U
NEW MEXICO	Stats. Ann. § 31-20A-3 (1982)	U
NORTH CAROLINA	Gen. Stats. § 15A-2000 (Cum. Supp. 1981)	U
OHIO	Rev. Code Ann. § 2929.03(D) (1982)	U
OKLAHOMA	Stats. Ann. § 21-701.11 (Supp. 1981-1982)	U
PENNSYLVANIA	Cons. Stats. Ann. tit. 42, § 9711 (Supp. 1982); Pa. R. Crim. P. 1120 (1982)	U
SOUTH CAROLINA	Code Ann. § 16-3-20 (Cum. Supp. 1981)	U
SOUTH DAKOTA	State Laws § 23A-27A-4 (1979)	U
TENNESSEE	Code Ann. § 39-2404 (Cum. Supp. 1981)	U
TEXAS	Code Crim. Proc. art. 37.071 (1981)	T
UTAH	Crim. Code § 76-3-207 (1978)	U
VIRGINIA	Code § 19.2-264.4 (Cum. Supp. 1979)	U
WASHINGTON	Rev. Code Ann. § 10.95.050-.080 (Supp. 1982)	U
WYOMING	Stats. § 6-4-102 (1981)	U

2. Jury Life Determination Not Binding

ALABAMA	1981 Acts, No. 81-178, §§ 8-9	A
FLORIDA	Stats. Ann. § 921.141 (Supp. 1982)	F
INDIANA	Stats. Ann. § 35-50-2-9 (1979)	U

3. Penalty Determination By Judges(s) Alone

ARIZONA	Rev. Stats. Ann. § 13-454 (Supp. 1978)
IDAHO	Code § 19-2515 (Cum. Supp. 1978)
MONTANA	Rev. Codes § 95.2206.6 (1977 Interim Supp.)
NEBRASKA	Rev. Stats. § 29-2520 (1975)

NOTATIONS

U--Unanimous jury determination required for death sentence
C--Connecticut procedure: Statute does not specify whether unanimous verdict required
N--Nevada procedure: If jury unable to agree on sentence, three-judge panel determines sentence; panel can only impose death sentence if three judges unanimously vote for death
T--Texas procedure: Penalty jury answers special questions on deliberate nature of murder, probability defendant would engage in future acts of dangerous violence, and (if raised) lack of provocation by victim; 12 jurors required to answer "yes" to each question for imposition of a death sentence; 10 jurors suffice to answer any question "no" and prevent death sentence
A--Alabama procedure: 10 jurors required for death, 7 jurors required for life
F--Florida procedure: Simple majority suffices for verdict of either life or death

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 1982, a copy of this Petition For Writ Of Certiorari To The Supreme Court Of The State Of Florida was mailed, postage prepaid, to Michael J. Kotler, Assistant Attorney General of the State of Florida, Park Trammel Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

Counsel for Petitioner